No. 04-1194

SUPREME COURT, U.S.
FILED
APR 22 2005

In The

Supreme Court of the United States

CLARENCE HARLEY,

Petitioner,

vs.

ROBERT ADLER, Individually and as Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Respondents.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

SUPPLEMENTAL BRIEF

CLARENCE HARLEY
2366 Seventh Ave – Suite 2
New York, NY 10030
(212) 479-7375

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INTRODUCTION

The case having been docketed by the Court on March 9, 2005 and the respondents having failed to submit a respondents' brief, the petitioner submits this supplemental brief in support of the original petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The petitioner having heretofore demonstrated that the case has so far departed from accepted and usual course of judicial proceedings and/or the lower courts have sanctioned extreme departures, as to call for an exercise of this Court's supervisory power. The failure of the respondents to respond to the petition is an inherent signal that the likelihood of continued backdoor preference which has been afforded them, heretofore, will cease.

This case presents novel issues where the lower courts allowed the respondents to pervert the law on the principles of res judicata. The record shows a complete failure of administrative bodies established under law, such as the grievance committees and the appellate division, to carry-out their mandate either to uphold the bar against corrupt and unscrupulous attorneys and/or attorney dealings and/or upholding the Constitutional rights of parties accessing the judicial system, respectively.

A. Lower Court's Improper Dismissal

Submitted for the Courts review is an excerpt from the underlying Surrogate action at Exhibit E, S-App. 11 which documents the prior issues before the Surrogate. The issues were the mismanagement of the estate as

result of purported sanctioning improper acts of Russell S. Smith namely, but not limited to, payments to Russell S. Smith's creditors which represented a violation of EPTL §11-4.7(a) and the appearance by the respondents as counsel for the public administrator.

The petition is devoid of any issues claiming fraud, deceit and collusion with the participating attorneys and/or devoid of a Judiciary Law section 487 claim. Notwithstanding, the application was never adjudicated (see App. 40a of petition).

The respondents' arguments before the lower courts at S-App. 16 are without merit.

New York Courts have identified when an attorney is liable to a third party in *Newberger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977) and *Singer v. Whitman and Ransom*, 83 A.D.2d 862, 442 N.Y.2d 26 (1981). Admission to the bar does not create a license to act maliciously, fraudulently or knowingly to tread upon the rights of others. Section 487 of Judiciary Law provides for a cause of action against an attorney where the deceit or collusion with the intent to deceive any party, occurred in a pending proceeding. It is sufficient if the deception relates to a prior judicial proceeding. Although the circumstances were pleaded by the petitioner, the lower courts failed to apply the circumstances to the case before the Court.

Consequently, the issue before the Court is whether the dismissal by the lower courts was rendered with a mental reservation or purpose of evasion of the petitioner's constitutional due process rights afforded by the V, VII and XIV Amendments to the Constitution of the United States.

B. Lengthy Administrative Apathy

Submitted for the Court's scrutiny is the submission of the respondent Robert Adler's letter dated November 10, 1989 wherein he affirmatively memorialized his court appearance on behalf of Russell S. Smith in the same referenced estate where he and his firm, thereafter, represented the Public Administrator. Also submitted is the affidavit of Joseph L. Smith at Exhibit A, S-App. 1, denying authorization and/or consent to a stipulation to pay the personal debts of Russell S. Smith. The affidavit directly refutes respondent Adler's position to the grievance committee that stipulations to pay personal loans of Russell S. Smith were signed by everyone (App. 55a-56a of petition).

Robert Adler claimed that said property was transferred to the beneficiaries by deed. Excerpt of the Surrogate's Court hearing, dated February 26, 1996 confirms the matter as is at Exhibit H, S-App. 22 and at App. 56a-57a of the petition. However, the record before the Court reflects the sale of said Quoque property by the public administrator for $121,000 on or about August 2, 2000, at App. 61a-70a of the petition. Certainly, the sale of that property beyond the jurisdiction of the public administrator's office should be considered a theft of property.

Joseph L. Smith raised his objections during the initial hearing on January 18, 1995 before the Surrogate as well as the petitioner raised objections but was fined $10,000 as is reflected in the record at Exhibit H, S-App. 22.

Moreover, the record before the Court has already established the respondent Robert Adler affirmatively misrepresented the issue of a "stipulation of counsel" with the petitioner's attorney at App. 56a and 37a-39a of the

Petition. In actuality respondent Adler's position statements, encompassing the above matters, are replete with misrepresentations. The circumstances are sufficient to have raised ethical considerations of the New York Code of Professional Responsibility. With so much information in the hands of the committee as is reflected in the petitioner's July 29, 2002 correspondence to the committee at Exhibit D, S-App. 6-10, how is it the committee continued *not* to find ethical violations? The proscription of DR 1-102 and DR 5-108, not deemed to be complete, were affirmatively violated. The relevant section of the rule reads as follows:

DR 1-102. Misconduct

A. A lawyer shall not:

1. Violate a Disciplinary Rule.

2. Circumvent a Disciplinary Rule through the actions of another

* * *

4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

5. Engage in conduct that is prejudicial to the administration of justice.

DR 5-108. Conflict of Interest – Former Client

A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:

1. Thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client.

> 2. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> * * *
>
> 5. Engage in conduct that is prejudicial to the administration of justice.

It is the joint apathy of the grievance committee and the appellate court, that fostered the predatory practices engaged in by the respondents.

The dismissal of the case barred the petitioner from raising the circumstances of the improper sale of property, the improper statements regarding a stipulation claimed by the participating attorneys and the improper statements about the monetary value of the estate. If the respondents employed the efforts of others to perfect the egregious outcomes, then the respondents engaged in fraud, collusion and deceit invoking the provisions of Judiciary Law section 487.

An issue before the Court is whether the dismissal by the lower courts was rendered with a mental reservation or purpose of evasion of the petitioner's constitutional due process rights afforded by the V, VII and XIV Amendments to the Constitution of the United States.

It is for this Court to determine whether the failure to find violative issues by the administrative bodies established under law such as the grievance committee, the Supreme Court, and the appellate court was deliberate, with a mental reservation or purpose of evasion of the petitioner's constitutional rights and accordingly, invokes section 42 USCA §1986.

The statute reads in its relevant parts:

> "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned

in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented. . . . " **42 USCA §1986**

CONCLUSION

The petition for a writ of certiorari should be granted. And given the respondents failure to make a showing, summary disposition should be granted in favor of the petitioner.

Respectfully submitted,

CLARENCE HARLEY

Dated: April 21, 2005

EXHIBIT A

Affidavit

STATE OF NEW YORK)
ss.:
COUNTY OF)

Joseph L. Smith, being duly sworn, deposes and says:

I was an interested party in the Estate of RUSSEL SMITH (Index No. 3219//85) held before the Surrogate's Court, Kings County. I further declare that I **did not** sign my name to any stipulation, nor consented to any stipulation or agreement proposed by the Public Administrator (Samuel Plotkin), or representative or agent for the Public Administrator, whereby, the Estate of RUSSELL SMITH would assume and/or pay personal loans – unsecured or otherwise, entered into by Russell Smith (a/k/a Russell S. Smith) during the pending administration of the Estate of RUSSELL SMITH.

/s/ Joseph L. Smith

/s/ Joseph Lynn Smith

/s/ Prasad Reddy Guntaka
PRASAD REDDY GUNTAKA
Notary Public –
State of New York
No. 01GU6078731
Qualified in Queens County
Certificates filed
in Kings County
My Commission Expires
August 5, 2006

STATE OF NEW YORK
COUNTY OF KINGS SS:

SWORN TO BEFORE ME
THIS 20th DAY OF
Sep. 2002

EXHIBIT B

Hesterberg & Keller
COUNSELLORS AT LAW
32 COURT STREET
BROOKLYN, NEW YORK 11201

(718) 875-7550

[Names and Addresses Omitted In Printing]

November 10, 1989

Carlyet D. Marshburn, Esq.
26 Court Street, Suite 903
Brooklyn, New York 11242

RE: Estate of RUSSELL SMITH

Dear Mr. Marshburn:

This will confirm our meeting in court on November 9, 1989 wherein I advise you that the proceeding brought by you on behalf of Joseph Lynn Smith has been adjourned to December 19, 1989.

The law secretary to Surrogate Bloom has graciously afforded us a Conference date on December 12, 1989 at 10:00 a.m. in his office to see if a meeting of the parties can resolve the issues involved.

I also hope that perhaps the parties can agree on a course of action prior to the December 12 Conference date, but, if that proves unsuccessful, I will meet you at Mr. Mack's office on December 12, 1989 and will bring Russell Smith with me. I suggest that you have Joseph Smith available as well.

If I can be of any help in the meantime, please feel free to contact me.

Yours truly,

ROBERT ADLER

RA: jw
cc: George Mack, Law Secretary
to Surrogate Bloom Russell Smith

EXHIBIT C

State of New York

Grievance Committee
for the
Second and Eleventh Judicial Districts

Renaissance Plaza
335 Adams Street – Suite 2400
Brooklyn, New York 11201-3745
(718) 923-6300

[Names Omitted In Printing]

October 30, 2002

PERSONAL AND CONFIDENTIAL

Mr. Clarence J. Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.
Docket No. K-1213-97

Dear Mr. Harley:

Your letter of September 30, 2002, which included an affidavit from Joseph L. Smith, has been forwarded to this Committee by Joan Hannon, Principal Appellate Court Attorney at the Appellate Division, Second Department.

Our records indicate that you filed a complaint against the above-named attorney in July 1997. Your complaint was investigated by the staff of the Grievance Committee. By letter dated April 15, 1998 (copy enclosed), you were advised that the full Committee had dismissed your complaint, finding that there was insufficient evidence of professional misconduct to warrant a sanction against the attorney.

Thereafter, at your request, your file was reviewed by a member of the Grievance Committee. By letter dated June 16, 1998 (copy enclosed), then Chairman Barry Karnins advised you that no basis was found upon which to re-open the file.

Then, in response to further communications from you, Robert H. Straus, then Chief Counsel, wrote to you on June 29, 1998 (copy enclosed), suggesting that you consult an attorney to discuss what civil remedies might be available to you.

We have again reviewed your file, dating back to 1997, along with your recent submission, namely an affidavit from Joseph L. Smith. However, we have again concluded that there is no evidence of professional misconduct warranting the imposition of discipline by this Committee.

This Committee does not have jurisdiction over matters which were before the Surrogate's Court. Again, if you have not already done so, you should consult an attorney to discuss what actions, if any, you might pursue with respect to the estate in question.

Again, we regret we can be of no assistance to you.

Very truly yours,

/s/ Diana M. Kearse
Diana Maxfield Kearse
Chief Counsel

DMK/kf
Enclosures

cc: Joan Hannon, Esq.
Robert C. Margolin, Esq.

EXHIBIT D

Clarence Harley
424 Park Ave South 111
New York, NY 10016

July 29, 2002

A. Gail Prudenti, Presiding Justice
New York State Supreme Court
Appellate Division 2nd Department
45 Monroe Place
Brooklyn, NY 11201

RE: Robert Adler, Esq.

Madam Justice:

I am in receipt of a letter from Joan Hannon, Principal Appellate Court Attorney, dated June 3, 2002.

Ms. Hannon's letter raised the issue of a prior complaint where Robert Adler and his firm mismanaged and misappropriated monies of an estate. The Grievance Committee dropped the ball during that investigation and sanctioned egregious misconduct and highly specious statements by the above respondent.

There are two principal issues relevant here and in the prior complaint. The first relates to Robert Adler's violation of fiduciary duty by, among other things, ignoring the law, improperly making payments to related and/or third parties with estate monies and hiding frauds of a prior client. The second relates to Mr. Adler going before the Surrogate and announcing that he had an agreement with unspecified parties to withdraw my petition filed before the court, even asserting to the grievance committee (hereafter referred to as the 2nd and 11th Committee) he

had perfected a "stipulation of counsel" – when actually those assertions were untrue.

I attach, for your direct review, statements submitted by Mr. Adler to the 2nd and 11th Committee dated September 4, 1997, and November 20, 1997, wherein he was substantively impeached on material assertions made to that committee (highlighted markings).

The 2nd and 11th Judicial Committee never compelled Mr. Adler to support material representations made before it:

- Mr. Adler failed to produce a stipulation of counsel between himself and Valerie Hawkins or any other attorney. Mr. Adler is seen lobbying for a formal written agreement in his December 12, 1994 letter to Valerie Hawkins (attached). But no stipulation was ever filed as shown by Valerie Hawkins' letter dated December 5, 1997 (attached).

- Mr. Adler failed to produce an agreement embodying the statement(s) made before the Surrogate on January 18, 1995, regarding my applications before the court.

- Mr. Adler failed to produce any stipulation signed by Joseph Smith and Harold Smith reforming two loans entered into by Russell S. Smith.

Finally, the 2nd and 11th Committee sanctioned Mr. Adler's November 20, 1997 statement (which buttressed his speculative position) that there were three Accountings before the Surrogate on January 18, 1995 when in fact

that was shown to be untrue.[1] Not only were the relevant documents in the hands of the Committee, but I also pointed out to the Committee the false and contradicting statements.

* * *

I am unconvinced of the 2nd and 11th Committee's determination since Mr. Adler was effectively impeached on the record. Furthermore, I am dissatisfied with the piecemeal coverage that your office has given this matter heretofore. I know that this matter may be difficult. Therefore, I will help you with the issues:

- If Mr. Adler or the 2nd and 11th Committee cannot legally explain why preferential treatment was afforded the creditors of Russell S. Smith vis-a-vis Russell S. Smith's inability to act as a co-administrator, pursuant to the Court decree dated August 5, 1993 (attached), then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce two sets of stipulations signed by Joseph Smith and Harold Smith reforming personal loans of Russell S. Smith (Sussman and Mazza), then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler made payments to parties who failed to file claims against the Estate of

[1] The committee designated Docket No. K-1213-97 to the complaint. Note the attempt to misdirect the case history by affixing Docket No. K-2099-96 to Mr. Adler's November 20, 1997, statement.

Russell Smith, then Mr. Adler violated his fiduciary duty, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a "stipulation of counsel" between Mr. Adler and Valerie Hawkins, then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce an agreement embodying the statements made before the Surrogate regarding my petitions before the Court (pages 4-5 of the transcript), then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a formal writing from Valerie Hawkins, pursuant to Mr. Adler's letter dated December 12, 1994, withdrawing the petition to remove the Public Administrator, then Mr. Adler committed fraud, and accordingly, the Committee erred in its determination.

- If Mr. Adler or the 2nd and 11th Committee cannot produce a stipulation of counsel between Mr. Adler and Valerie Hawkins, then the Committee allowed Mr. Adler to submit false statements.

- If Mr. Adler or the 2nd and 11th Committee cannot show that three Accountings were before the Surrogate on January 18, 1995, then the Committee allowed Mr. Adler to submit false statements (Mr. Adler's November 20, 1997 statement).

- If Mr. Adler cannot produce objections filed by my office to the Public Administrator's Accounting, then the Committee allowed Mr., Adler to submit false statements (Mr. Adler's September 4, 1997 statement, point 26).

- If Mr. Adler used the efforts of other parties to compromise or otherwise obstruct my petitions from being adjudicated, then Mr. Adler engaged in collusion.

Madame Justice, there is no need for a "full-scale re-investigation . . . ". The Committee was either provided with such from Mr. Adler to support their determination or not. The specifics are before you. Accordingly, I expect your office to weigh the concerns against the rules and laws that governs the conduct and behavior of attorneys, since the 2nd and 11th Committee failed to do that during its investigation. Neither the statute of limitation nor laches applies to disciplinary proceedings with respect to an attorney (Matter of O'Hara 63 A.D.2d 500 408 N.Y.S.2d 70).

Please review Mr. Adler's September 4, 1997, and November 20, 1997, statements, the Court decree dated August 5, 1993, as well as, the three letters included with these comments. I request a written reply of any action your office may intend to pursue.

I thank you for the time and assistance your office has offered so far in this matter.

Respectfully yours,

/s/ Clarence Harley
Clarence Harley

cc: J. Kaye, Chief Justice

EXHIBIT E

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of CLARENCE J. HARLEY, Petitioner, for a decree revoking the Letters of Administration of SAMUEL PLOTKIN, Public Administrator, Pursuant to SCPA § 712, THE ESTATE OF RUSSELL SMITH, Deceased.	**VERIFIED PETITION** File No. 3219/85 [Illegible] R.C.

TO THE SURROGATE'S COURT, COUNTY OF KINGS:

The Verified Petition of Clarence J. Harley respectfully alleges as follows:

1. Petitioner, CLARENCE J. HARLEY, a Public Accountant who maintains an office in Kings County, is a creditor of the estate of the above named deceased by virtue of the fact that in May 1988 petitioner was retained by Joseph L. Smith and Russell Sammuel [sic] Smith, distributees and former co-administrators of the estate of Russell Smith, deceased, to render accounting services to the said estate. (A copy of the agreement between your affiant and the former co-administrators dated November 10, 1989 is attached as Exhibit "A".)

2. Petitioner seeks to have the appointment of Sammuel Plotkin, as administrator of this estate, revoked on the grounds that said administrator, through his attorney Robert Adler, Esq. and the Law Office of Hesterberg and Keller, has engaged in conduct adverse to the interest of the subject estate, thereby putting in jeopardy

the ability of petitioner to collect upon his claim to the subject estate.

3. The deceased, Russell Smith died intestate, domiciled in Kings County, in 1984.

4. The distributees of the deceased are the above mentioned, Joseph L. Smith and Russell Sammuel Smith, and Harold Smith and Rickie Smith, who are nephews of the deceased and who are all brothers.

5. Upon information and belief, the assets of the subject estate consist of a three-family home located in Kings County, New York and two parcels of vacant land located in Suffolk County, New York. The value of said assets was approximately One Hundred Thousand ($100,000.00) Dollars at the time of the death of the deceased.

6. On or about August 11, 1986, the above mentioned nephews-distributees of deceased, Joseph L. Smith and Russell Samuel Smith, were appointed co-administrators of the subject estate by order of this Court.

7. Both before and during his appointment as co-administrator of the subject estate, Russell Samuel Smith engaged in conduct for his own personal gain and adverse to the interests of the subject estate. Such conduct included, but was not limited to, acting in the stead of Russell Smith, deceased, and mortgaging the above mentioned assets of the subject estate, unbeknownst to Joseph L. Smith.

8. In or about September 1989, Joseph L. Smith brought a petition against Russell Samuel Smith to revoke the appointment of Russell Samuel Smith as co-administrator of the subject estate.

9. Robert Adler, Esq. of the Law Firm of Hesterberg and Keller, represented Russell Samuel Smith in said revocation proceeding (See Exhibit A attached).

10. However, on or about August 9, 1993, this Court revoked the appointments of both Joseph L. Smith and Russell Samuel Smith as co-administrators of the subject estate and letters of administration were issued to Sammuel Plotkin, the Public Administrator. (See Exhibit B attached.)

11. On or about January 27, Robert Adler and the Law Firm of Hesterberg and Keller were appointed representatives of Sammuel Plotkin, the Public Administrator to administer the subject estate.

12. Petitioner herein seeks the revocation of the administration powers of Sammuel Plotkin, Public Administrator because the prior representation of Russell Samuel Smith by Robert Adler Esq. and the Law Firm of Hesterberg and Keller, the representatives of Sammuel Plotkin, presents a conflict of interest. Sammuel Plotkin has been advised of this conflict of interest (See Exhibit C attached.)

13. Moreover, since the appointment of Robert Adler, Esq. and Hesterberg and Keller, there has been a swift and systematic attempt to obscure and obfuscate the improper and illegal acts committed by Russell Samuel Smith as aforementioned.

14. Specifically, Robert Adler, Esq. and his said firm have sanctioned a contract to sell property of the subject estate, which was entered into by Russell Samuel Smith, despite their knowledge of his improper actions as a fiduciary of the subject estate. In addition to the fact that

Russell Samuel Smith lacked the authority to enter into said contract, the contract, upon information and belief, is an imprudent one because the contract price is far below market value. (See Exhibit D attached.)

15. Further, Robert Adler, Esq. and his firm are attempting to allow personal creditors of Russell Samuel Smith to become priority creditors of the estate, rather than attempting to defend the estate against said creditors. Robert Adler, Esq. has informed Petitioner that he wants to "reform" loans of Russell Samuel Smith so that the subject estate shall become the maker of same.

16. Indeed, Robert Adler, Esq. has attempted to cajole Joseph L. Smith to agree to and to sanction the improvident, deals and negotiations that he has set up with the personal creditor's of Russell Samuel Smith. There have been indications of record doctoring to minimize and obfuscate these transactions.

17. Russell Samuel Smith did not deal with his creditors as a fiduciary of the subject estate and he lacked the authority to enter into these deals. Therefore, any acts by him should be carefully scrutinized to determine whether they benefited the estate. Moreover, petitioner believes that this Court will find said dealings did not benefit the estate, Russell Samuel Smith's lack of authority notwithstanding. Thus, any creditor claims arising from the dealings of Russell Sammuel Smith should be null and void with respect to the subject estate.

* * *

WHEREFORE, it is respectfully requested that:

(1) that this Court issue an order immediately suspending the powers of Sammuel Plotkin, Public Administrator;

(2) that the appointment of Sammuel Plotkin as Administrator of the subject estate be revoked; and

(3) that this Court grant such other and further relief as this Court deems just, equitable and proper.

Dated: Kings County, New York
November 10, 1994

/s/ Clarence J. Harley
CLARENCE J. HARLEY

EXHIBIT F

Excerpt from Respondents Brief – Appellate Division

* * *

POINT I

THE COURT BELOW PROPERLY GRANTED ADLER'S MOTION BECAUSE HARLEY'S CLAIMS WERE PREVIOUSLY DISMISSED ON THE MERITS

Harley was afforded a full and fair opportunity to litigate his claims of fraud, deceit and collusion and the alleged violation of Judiciary Law § 487 in the context of the Estate proceeding and, in fact, specifically raised those issues in that proceeding (RA 27, ¶ 37). Harley's claims were properly dismissed by the Surrogate's Court. Having had a full opportunity to present these claims to the Surrogate's Court, the lower court properly precluded Harley, under the doctrines of *res judicata* and collateral estoppel, from pursuing further litigation against Adler and Hesterberg & Keller in relation to the same issues adjudicated in the Surrogate's court proceeding below.[11]

Under the doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action. *Luce v. New York, C.&S.L.R. Co.*, 213 A.D. 374, 376-77, 211 N.Y.S. 184 (4th Dep't 1925), *appeal*

[11] It is respectfully noted that these issues are also the same issues Harley presented to the Grievance Committee which dismissed the grievance against Adler.

dismissed, 241 N.Y. 541, 150 N.E. 546 (1925) *aff'd*, 242 N.Y. 519, 152 N.E. 409 (1926), *Singleton Management Inc. v. Shakim Compere*, 243 A.D.2d 213, 673 N.Y.S.2d 381 (1st Dep't 1998).

New York Court's have been consistently clear that a judgment or settlement in one action is conclusive in a later action not only as to any matters actually litigated therein, but also as to all matters that *might have been readily litigated*, when the two causes of action have such an identity that a different judgment in the second would destroy or impair rights or interests established by the first.

EXHIBIT G

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Stipulation In The Accounting Of Russell S. Smith, as Former Co- Administrator Of The Estate Of Russell Smith, Deceased. Accounting Of Joseph L. Smith As Co-Administrator, Estate Of Russell Smith, Deceased.	File Number 85-3219

2 Johnson Street
Brooklyn, New York 11201

February 27, 1996

* * *

[6] And whereas the Court having scheduled a trial of the issues for February 27, 1996.

And whereas all of the parties knowing the uncertainty of a trial and wishing to resolve their differences without further expense and delay agree as follows:

Part indenting now in the transcriber's report the following agreements numbered as follows:

Number 1: Russell Smith hereby withdraws his objections to the accounting of Joseph Smith.

Number 2: Joseph Smith hereby withdraws his objections to the accounting of Russell Smith.

Number 3: The Public Administrator of Kings County hereby withdraws his objections to the accountings of both Russell Smith and Joseph Smith.

Number 4: Russell Smith hereby agrees to transfer his interest in the decedent Russell Smith's real estate located in Quogue, New York, to Joseph L. Smith.

The next number: Russell Smith will upon receipt of the necessary documents to transfer his interest in the real property in Quogue, New York, [7] to his brother Joseph Smith will execute those documents in a timely fashion and return them to the Public Administrator so that they can be delivered to Dennis Gayle as attorney for Joseph Smith.

Next number: The Public Administrator has been advised of possible additional assets belonging to the estate of Joseph Smith, namely at least one account originally held at the East New York Savings Bank now with the office of the State Comptroller as abandoned property, and perhaps an additional bank account in the name of Russell Smith which may have been misappropriated by a third party.

The public administrator hereby agrees to do whatever is necessary to obtain the proceeds of the East New York Savings Bank account presently held by the State Comptroller and do whatever it can to pursue whatever rights the estate may have against this unidentified third-party and/or the East New York Savings Bank.

The Public Administrator will file his final account as administrator within 90 days from the date of this Court's decision approving the [8] settlement – approving this settlement as agreed to by the parties.

The parties, namely Russell Smith and Joseph Smith, hereby reserve any and all rights they have to file any and all objections to the Public Administrator's account as administrator of the estate of Russell Smith.

Next number: The parties by entering into this agreement hereby release each other from any and all claims they have against each other with regard to the estate of Russell Smith; that is, Russell Smith hereby releases Joseph Smith from any claim he has against Joseph Smith for any acts Joseph Smith has taken either as co-fiduciary or in any capacity with regard to the estate of Russell Smith, and Joseph Smith hereby releases Russell Smith, his co-administrator in the same capacity.

And next number: The parties – the Public Administrator hereby releases any and all claims it has against Joseph Smith and Russell Smith for their acts as co-administrators of this estate of Russell Smith.

Next number for clarification: The deed transferring the ownership interest of Russell [9] Smith to Joseph Smith of the decedent Russell Smith's real property in Quogue, New York, shall be by quit claim deed.

THE COURT: Okay. Counsel, is that acceptable? Anything to add?

MR. GAYLE: That is acceptable on behalf of Joseph Smith. Nothing to add.

MR. GORDON: On behalf of Russell Smith the stipulation as dictated is acceptable.

THE COURT: Okay. Joseph Linn Smith?

JOSEPH SMITH: Yes.

THE COURT: Okay, have you been here while this stipulation was dictated on the record?

JOSEPH SMITH: Yes, I was.

THE COURT: Are you familiar with the terms of the stipulation?

JOSEPH SMITH: I am.

THE COURT: Do you understand the stipulation?

JOSEPH SMITH: I do.

THE COURT: Okay, have you consulted with your attorney regarding the terms and conditions of the stipulation?

JOSEPH SMITH: Yes, I have.

* * *

EXHIBIT H

EXCERPT FROM SURROGATE'S COURT HEARING HELD JANUARY 18, 1995

* * *

[8] JOSEPH SMITH: My name is Joseph L. Smith, excuse me. My name is Joseph L. Smith. I am one of the distributee –

THE COURT: Speak louder, please, because you have a mike in front of you. We don't have a reporter. You can sit down. Take it easy.

JOSEPH SMITH: Okay. I'm one of the distributees and one of the ex-co-administrators. My thing I had brought as a point of interest to the Surrogates Court was the fact that Mr. Adler had previously defended my brother concerning this very same estate. At the point of his being chosen to represent the surrogate, I brought that up again

* * *

[11] without the appointment of the Public Administrator.

Well, the next day or perhaps the day after, I received a call from Mr. Smith, Russell Smith, telling me that he had worked out his problems with his brother and there was not need for the conference. And I said, fine. I wrote him a letter telling him that he wouldn't proceed on his behalf. And that was, in all respects, the end of the matter.

Now, they – Mr. Joseph Smith, has raised this issue a couple of times. Your Honor, I think it's really – I don't think I should waste the Court's time anymore with regard to this issue. There are much more complicated issues before this court. I can only tell you, your Honor,

that in proceeding on behalf of the Public Administrator, I have filed as many, if not more, objections to the accounting of Russell Smith than I have with regard to the estate of – the accounting of Joseph Smith.

The Public Administrator's position isn't tainted in any way based upon a five-minute conversation that I had with Russell Smith five or

* * *

[24] THE COURT: I want to call the District Attorney's office. I want him picked up right away.

(DISCUSSION HELD OFF THE RECORD.)

THE COURT: Yea, put it on the record. There's no conflict of interest whatsoever here.

MR. HARLEY: Your Honor, I was – I appeared here in Court on the date that Mr. Adler represented Russell Smith.

MR. ADLER: Your Honor, your Honor, Mr. Harley – first of all, I'd like to say something to you. I never ever appeared in court and represented Russell Smith. Mr. Harley absolutely, your Honor, has no right, not only to make that statement, but Mr. Harley has no interest in this proceeding. He is proceeding improperly, he has a claim –

THE COURT: No. I want him to make the interest because you're a CPA?

MR. HARLEY: I'm a public accountant, sir.

MR. ADLER: No, he's not a CPA.

THE COURT: Oh, but you have a license?

MR. ADLER: He does not have a license as [25] a Certified Public Accountant.

THE COURT: Oh.

MR. ADLER: He holds himself out to be a public accountant.

THE COURT: Oh, okay. But I want that on the record. Okay, that statement that he made, I want it on the record. Okay. Because he's a party to this as far as I'm concerned. As far as the fines are concerned, he's involved in this thing too. Everybody is. As soon as he gets the date.

And, sir, who you do you represent?

MR. GORDON: Bryan Gordon, I represent Russell Smith.

THE COURT: What firm?

MR. GORDON: From Gordon, Jackson and Simon.

THE COURT: Oh, okay. Fine. Have you got a date?

MR. MUND: Monday, January 8, 199 –

THE COURT: Put this down. Monday, January 8, 1996, ten a.m. sharp in this court. And I'd advise you to contact that Mr. Gayle before I get to him or before he gets up here because he will be fined the sum of $10,000.00 too. And I

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